

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION)	
FOR PERMIT NO. 72-07562 IN THE)	
NAME OF LIVING WATERS RANCH)	AMENDED
_____)	RECOMMENDED ORDER

On March 5, 1999, the hearing officer for the Department of Water Resources ("Department") issued a Recommended Order in the above captioned matter approving the application with certain conditions.

On March 19, 1999 and on March 26, 1999, protestant Paris Almond and intervenor Patsy Strickland, respectively, filed Petitions For Reconsideration ("petitions") with the hearing officer. Having reviewed the petitions, the hearing officer responds to the petitions as described below.

The amended Moratorium Order for the Salmon River and Clearwater River issued on April 30, 1993 does not apply to the appropriation of groundwater. Never the less, Condition of Approval No. 3, which requires mitigation of the estimated depletion of 1.4 acre feet per year will assure that discharge from the Garden Creek drainage will not be diminished. The testimony that bull trout are found within the Garden Creek drainage, did not establish the effect, if any, of the proposed appropriation on the species.

The information and testimony submitted by the applicant at the hearing was sufficient to show that the application is in the public interest.

Condition of Approval No. 3 requires the applicant to mitigate its use of water prior to diverting water under terms of the permit. In its review of the adequacy of proposed mitigation, the Department will provide the opportunity for the protestant and intervenor to review and comment on the mitigation proposal.

Condition of Approval No. 2 should be changed to read as shown in this Amended Recommended Order.

Condition of Approval No. 4, should be changed to read as shown in this Amended Recommended Order.

Condition of Approval No. 10 allows the Department to require the installation of a suitable measuring device and to report the amount of water diverted as determined necessary by the department. It is premature to know whether there is actually a need

for measuring and reporting of water diverted under the permit. This condition should not be changed.

The Department should add a condition of approval relative to the diversion of water from more than one well under the permit.

Water Right No. 72-16274 which authorizes diversion of water from a spring for domestic purposes should not be limited or encumbered with conditions of use associated with Permit No. 72-07562.

Based upon his understanding of the facts and the law in this matter, the hearing officer recommends the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. On July 30, 1998, Living Waters Ranch ("applicant") submitted Application for Permit No. 72-07562 ("application") to the Department proposing the diversion of 0.40 cubic feet per second ("cfs") of ground water to be diverted within NE1/4NW1/4 (Lot 3), Section 2, T13N, R18E, B.M. to be used year-round for domestic purposes in connection with a non-denominational church camp ("church camp" or "camp").

(Note: The "1/4" designations will be omitted from subsequent legal descriptions in this order).

2. The Department published notice of the application which was subsequently protested by Paris Almond. Patsy Strickland and Max D. Anderson subsequently sought intervention into the matter which was granted by the Department.

3. On February 25, 1999, the Department conducted a hearing in the matter. Christopher James was present and represented the applicant. Protestant Paris Almond was present and was represented by Norman Semanko. Don Weinreich appeared for intervenor Patsy Strickland. Intervenor Max D. Anderson did not appear.

4. Issues identified by the protestant include the following:

- a. The application will reduce the quantity of water under existing water rights.
- b. The water supply itself is insufficient for the purpose for which it is sought to be appropriated.
- c. The application conflicts with the local public interest.
- d. The application is contrary to the conservation of water resources within Idaho.

5. Exhibits premarked, offered or accepted as a part of the record include the following:

- a. Applicant's Exhibit 1 - Letter dated January 26, 1999, to Christopher James from Mark Dietrich of the Division of Environmental Quality
- b. Applicant's Exhibit 2 - Letter dated February 4, 1999, to Christopher James from Gregory Eager of the Division of Environmental Quality
- c. Applicant's Exhibit 3 - A copy of a portion of a USGS Quadrangle map of the Garden Creek area
- d. Applicant's Exhibit 4 - A copy of a portion of a USGS Quadrangle map of the Garden Creek area
- e. Applicant's Exhibit 5 - Letter dated February 23, 1999, to Living Waters Ranch from Jack S. Hammond together with attachments
- f. Applicant's Exhibit 6 - Drinking Water Analysis Results performed by National Testing Laboratories, LTD
- g. Applicant's Exhibit 7 - Photograph
- h. Protestant's Exhibit A - IDWR water right information for Application No. 72-07562, SRBA water right claims in the name of Christopher James Trust, and nine (9) listings of water rights compiled by section
- i. Protestant's Exhibit B - Map of Garden Creek vicinity
- j. Protestant's Exhibit C - Watermaster's Report for 1980
- k. Protestant's Exhibit D - Watermaster's Report for 1983
- l. Protestant's Exhibit E - Watermaster's Report for 1984
- m. Protestant's Exhibit F - Watermaster's Report for 1985
- n. Protestant's Exhibit G - Watermaster's Report for 1987
- o. Protestant's Exhibit H - Watermaster's Report for 1988
- p. Protestant's Exhibit I - Watermaster's Report for 1989
- q. Protestant's Exhibit J - Watermaster's Report for 1990

- r. Protestant's Exhibit K - Watermaster's Report for 1991
- s. Protestant's Exhibit L - Watermaster's Report for 1995
- t. Protestant's Exhibit M - Watermaster's Report for 1997
- u. Protestant's Exhibit N - Watermaster's Report for 1998
- v. Protestant's Exhibit O - Letter dated February 22, 1999, to Water Hearing Officer from Donald R. And Bonnie Rowles
- w. Protestant's Exhibit P - Resume for Charles G. Brockway
- x. Protestant's Exhibit Q - A report titled Hydrologic Investigation of the Garden Creek Watershed and Aquifer prepared by Brockway Engineering - February 11, 1999

6. The church camp is located about 4 miles west of the city of Challis, Idaho in the Garden Creek drainage. Existing facilities at the camp include an 8,500 square foot chapel designed to accommodate 450 people, a 5,000 square foot lodge with a sleeping capacity of 50 persons, a kitchen within the lodge which can serve about 200 people per meal and a shop. Thirteen buildings are currently hooked up to water. Additional development planned includes hooking up seven additional buildings and some R.V. and camping sites near Garden Creek. At ultimate buildout, the camp will have an overnight capacity of 250 persons.

7. Presently the camp receives water from two wells which have a total capacity of about 25 gallons per minute ("gpm"). The oldest well, which may be 30 to 40 years old, provides about 10 gpm and the newer well drilled in 1997 to a depth of 63 feet provides about 15 gpm. A 35,000 gallon elevated water tank is part of the water distribution system and is used to stabilize fluctuating water demands and provide water for fire protection. There are no recorded water rights in connection with the two existing wells.

8. The applicant describes its intention as drilling a high capacity production well for the purposes of fire protection when water from the 35,000 gallon storage tank might not be available due to cleaning, maintenance or repair of the tank and the capacity to meet fluctuating water supply demands of the camp. The applicant believes such a well can be obtained by drilling to a depth of 600 to 650 feet similar to wells drilled by the city of Challis at a location approximately 2.5 to 3.0 miles east of the applicant's proposed site. The applicant stated that if a large capacity well is obtained, the wells likely would be interconnected but wasn't sure which well would be the primary use well.

9. DEQ has authorized a discharge of up to 1,800 gpd through the camp's sewer system. At ultimate build out, the estimated discharge capacity of the septic system will be 5,000 gpd. Two 10,000 gallon effluent treatment tanks are planned to accommodate fluctuating discharge demands on the septic system.

10. The applicant testified that the existing two wells would provide a sufficient volume of water for use at ultimate build out, but that additional instantaneous diversion capacity is needed to meet peak water use demands and fire protection needs. In addition, a larger diameter, deeper well would be desirable to ensure system stability.

11. The applicant has filed a Snake River Basin Adjudication (SRBA) Claim as follows:

Identification No:	A72-16274
Source:	Unnamed Spring tributary to Garden Creek
Priority:	June 1, 1965
Rate of diversion:	0.04 cfs
Point of diversion:	SENW Section 3, T13N, R18E, B.M.
Use:	Domestic
Season of use:	Year-round
Place of use:	Lot 3, Section 2, T13N, R18E, B.M.
Remarks:	Two cabins, one shower house and lawn

This spring produces about 25 gallons per minute but is presently not being used for domestic purposes due to contamination problems.

12. The applicant owns several water rights in Garden Creek which are used for the irrigation of land of the camp. Groundwater is not used for irrigation.

13. The applicant's statement that its financial resources are sufficient to complete the planned project was uncontested.

14. The applicant's engineer stated that 150 gpm is his recommendation for the maximum instantaneous rate of diversion needed by the applicant. For fire protection purposes, DEQ requires a capacity of 250 gpm for the duration of 1 hour.

15. The well of protestant Paris Almond is about ½ mile east of the applicant's property. The well which is downgradient from the applicant was drilled to a depth of 435 feet and yields about 4 to 10 gpm. The protestant expressed concern about injury to both quantity and quality of water available in the future as well as the density of people and traffic associated with the applicant's camp.

16. Development in the Garden Creek drainage, excluding the applicant's camp, consists of about 10 to 12 single family residences and irrigation uses from Garden Creek. Groundwater is not used for irrigation.

17. The total annual surface water yield from the Garden Creek drainage is estimated to be 13,530 acre feet. The aquifer discharge associated with Garden Creek is estimated to be 16.7 acre feet per year. Garden Creek gains water in some reaches and loses water in other reaches.

18. Groundwater and surface water in the Garden Creek drainage upstream from Challis are hydraulically connected. Depletion of groundwater will decrease the amount of surface water available in Garden Creek.

19. The protestant estimates the maximum water use by the camp at full build out as about 5.7 acre feet per year of which approximately 1.4 acre feet per year is consumptive. Depletion of 1.4 acre feet per year from the aquifer will decrease the amount of surface water available in Garden Creek by some undetermined amount. In terms of irrigation, if the depletion effect were 100%, the amount of water depleted would be about the amount to irrigate ½ acre of land.

20. On behalf of intervenor Patsy Strickland, Don Weinreich expressed concern that diversion of water by the applicant might make less water available from the Strickland well which is located approximately 1,000 feet east of the applicant's project. The Strickland well is downgradient from the applicant and is approximately 420 feet deep with a depth to water of about 30 feet.

21. Garden Creek is within Water District 72-B where water deliveries are administered during times of water shortage by an elected watermaster.

22. Water delivery records of Water District 72-B show that delivery of water to junior users on Garden Creek is curtailed at times during many water years due to diminishing flow available to provide water to all water rights.

23. Custer County has not enacted planning and zoning requirements which would preclude the applicant's development.

24. Use of water for firefighting is an implied use for any water right up to the maximum amount of a water right which is actually being used to suppress a fire.

CONCLUSIONS OF LAW

1. Section 42-203A, Idaho Code, provides in pertinent part as follows:

In all applications whether protested or not protested where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant

has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use, or (f) that it is contrary to conservation of water resources within the state of Idaho; the director of the department of water resources may reject such application and refuse issuance of a permit therefor... .

2. Section 42-111, Idaho Code, provides in pertinent part as follows:

(1) For purposes of sections 42-221, 42-227, 42-230, 42-235, 42-237a, 42-242, 42-242 and 42-1401A, Idaho Code, the phrase "domestic purposes" or "domestic uses" means:

(a) The use of water for homes, organization camps, public campgrounds, livestock and for any other purpose in connection therewith, including irrigation of up to one-half ($\frac{1}{2}$) acre of land, if the total use is not in excess of thirteen thousand (13,000) gallons per day, or

...

(3) Multiple water rights for domestic uses or domestic purposes, as defined in this section, shall not be established or exercised in a manner to satisfy a single combined water use or purpose that would not itself come within the definition of a domestic use or purpose under this section. The purpose of this limitation is to prohibit the diversion and use of water, under a combination of domestic purposes or domestic uses as defined in this section, to provide a supply of water for a use that does not meet the exemption of section 42-227, Idaho Code, and is required to comply with the mandatory application and permit process for developing a right to the use of water pursuant to chapter 2, title 42, Idaho Code.

3. The church camp qualifies for inclusion among the "domestic uses" described in Section 42-111, (1), a, Idaho Code, and is authorized to divert up to 13,000 gallons per day from groundwater in connection with the church camp without the necessity of filing an application for permit. The total use of water from all wells in connection with the church camp, however, can not exceed a total of 13,000 gallons per day under the exemption.

4. Fire protection should be considered as a use under Permit No. 72-07562 provided the use is conditioned to not enlarge the amount of water authorized for diversion under "domestic purposes."

5. There is no evidence to indicate there is an upper aquifer and lower aquifer in the Garden Creek drainage which is separated by a confining layer. Hence, it

is likely that a deep well drilled in the Garden Creek drainage will affect flows in Garden Creek.

6. Depletion of 1.4 acre feet per year from the aquifer in the Garden Creek drainage will decrease surface water discharge in Garden Creek. The applicant could mitigate the depletion effect of its application by ceasing to irrigate ½ acre of land or by providing other acceptable mitigation.

7. Use of water as proposed in the application will not reduce the quantity of water under existing water rights if the use is adequately mitigated.

8. The water supply itself is sufficient to provide the volume of water necessary for the purposes intended.

9. The application is made in good faith and not for delay or speculative purposes.

10. The applicant has sufficient financial resources with which to complete the project.

11. The application does not conflict with the local public interest.

12. The application is not contrary to the conservation of water resources within Idaho.

13. The Department should approve the application with conditions and limitations to protect existing surface water and ground water rights in the area.

ANALYSIS

The protestant contended that since the church camp charged a fee for use of its facilities, that the use should be defined as "commercial". While charges for goods and services may be a consideration in the categorization of a proposed use, it is not the only factor to consider. In this case, it is reasonable to consider that the general nature of water use by the church camp can be included in the "organization camp" language described in section 42-111(1) a, Idaho Code.

The applicant and protestant disagree on the methodology on how the maximum instantaneous rate of diversion design should be established and hence advocate substantially different rates. The applicant's engineer recommends a design rate of 0.33 cfs (150 gpm) and the protestant's engineer recommends 0.091 cfs (41 gpm). The applicant may not be able to obtain the rate of diversion desired, but likely will be able to obtain the volume sought.

Permit No. 72-07562 authorizes the diversion of water from one well. If the applicant intends to divert water under the permit from additional wells, the applicant must seek use of additional wells by submitting an application for amendment to the Department.

The applicant was not required to file an application for permit for the extent of domestic use sought in Application for Permit No. 72-07562, since the use proposed by the applicant is small enough to be exempt from the mandatory permit filing requirement of Section 42-229, Idaho Code. Hence, if the Department denied the application, the applicant could still legally develop the domestic use anticipated under the application after obtaining a drilling permit from the Department. Since an application was submitted, however, the applicant is not limited in the extent of development described in Section 42-111, Idaho Code.

ORDER

IT IS THEREFORE hereby ORDERED that the protest of intervenor Max D. Anderson is **SET ASIDE** for failure to appear at the hearing.

IT IS FURTHER, hereby ORDERED that Application for Permit No. 72-07562 in the name of Living Water Ranch is **APPROVED** subject to the following conditions and limitations:

1. Proof of construction of works and application of water to beneficial use shall be submitted to the Don or before **April 1, 2001**.
2. The maximum rate of diversion authorized under this permit shall not exceed 0.33 cfs (150 gpm) nor a maximum annual volume of 5.7 acre feet plus the volume of water actually used in the suppression of fires.
3. Prior to diversion of water under this permit, the right holder shall specifically identify the location of ½ acre of irrigated land which the right holder agrees to no longer irrigate in order to mitigate the consumption which will occur under Permit No. 72-07562 or shall provide other suitable mitigation for review and approval by the Department.
4. The use of water for fire protection purposes is included within the domestic use authorized but shall not increase the maximum rate of diversion of water authorized for domestic purposes under terms of the permit.
5. The right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code.
6. Use of water under this approval shall comply with applicable water quality standards of the Division of Environmental Quality of the Idaho Department of

Health and Welfare.

7. Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which the permit holder had no control.


8. This permit authorizes use of water for a chapel, a lodge with kitchen, a shop, 20 buildings with assorted uses, and some R.V. and camping sites near Garden Creek.

9. Water diverted under this permit may not be used for irrigation purposes.

10. After specific notification of necessity by the Department, the right holder shall install a suitable measuring device at the point of diversion or shall otherwise provide a means acceptable to the Department to measure the rate of diversion and volume of water diverted and shall report the amounts to the Department at a frequency determined by the Department.

11. The permit holder shall submit an application for amendment to the Department if the permit holder intends to divert water from more than one well for the domestic use authorized under Permit No. 72-07562.

Signed this 1st day of April, 1999.


L. GLEN SAXTON
Hearing Officer